

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANCENE GREWE and LORI
EBELHARD, on behalf of others
similarly situated,

Plaintiffs,

V.

COBALT MORTGAGE, INC.,

Defendant.

CASE NO. C16-0577-JCC

ORDER GRANTING MOTION FOR
A TEMPORARY RESTRAINING
ORDER

This matter comes before the Court on Defendant Cobalt's Motion for a temporary restraining order ("TRO") or, alternatively, a protective order (Dkt. No. 49). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

1. BACKGROUND

On April 21, 2016, the above-captioned matter was filed in this Court after the parties participated in mediation. (Dkt. No. 1.) The same day, April 21, the parties sought certification of this FLSA collective action and approval of the settlement achieved at mediation. (Dkt. No. 3.) On May 2, 2016, Eric Engelland moved to intervene and objected to the proposed settlement. (Dkt. No. 14.) The Court granted the motion to intervene, considered Mr. Engelland's objections, and ordered the parties to submit additional briefing before it would approve the settlement.

1 (Dkt. No. 31.) Upon receipt of that additional briefing, the Court ultimately approved the
2 settlement. (Dkt. No. 48.) In its most recent order, the Court made clear that it had concerns
3 about the parties' communications with putative class members via a notice letter. (*Id.* at 7.) As
4 has been discussed in the Court's previous two orders, the complications of this case stem from
5 its overlap with a pending collective FLSA action against Defendant Cobalt in King County
6 Superior Court, *Bell-Beals*, in which Intervenor Engelland is a named plaintiff. (See Dkt. No. 31
7 at 2.)

8 After approving the collective action settlement and adopting a notice process, the Court
9 has been informed—through the filing of Cobalt's present motion—that Engelland's counsel Jeff
10 James sent a letter to putative members of the settlement class who may also be potential class
11 members in the *Bell-Beals* suit. (Dkt. No. 49.) The letter, which functions essentially to dissuade
12 potential collective action members from opting into the settlement in the above-captioned
13 matter, preempts the notice process approved by the Court. (Dkt. No. 50 at 5–8.) It suggests that
14 Mr. James represents the person receiving the letter despite the fact that no class has been
15 certified in the *Bell-Beals* suit. (Dkt. No. 50 at 5; Dkt. No. 51 at 6.) (“Our law firm represents
16 persons such as yourself . . .”) The letter mischaracterizes the Court's orders and omits any
17 mention of the Court's ultimate determination that the settlement is fair and reasonable. (Dkt.
18 No. 50 at 6) (describing the Court's orders as “not mak[ing] any specific finding that the
19 proposed settlement was a ‘good deal.’”) Mr. James disingenuously pulls a quote from the
20 Court's first order, writing that, “the United States District Court Judge described Cobalt's
21 compensation methods as ‘a scheme,’” despite the fact that the Court's order only wrote that “the
22 Department of Labor refers to policies . . . like that *allegedly* employed in this case . . as
23 schemes.” (Dkt. No. 50 at 6; Dkt. No. 31 at 6) (emphasis added). The Court did not make any
24 ruling on the merits determining that Cobalt's pay practices constituted a “scheme.” In a similar
25 manner, the letter grafts a portion of the Court's order acknowledging Engelland's arguments
26 and presents it as holding: “[a]s the Court noted in the accompanying Order, Cobalt seems to

1 have established a scheme whereby it *discouraged* employees from reporting the actual number
2 of hours worked.” (Dkt. No. 50 at 7) (emphasis in original). The Court’s Order actually simply
3 noted that, in considering whether permissive intervention was warranted, that Engelland sought
4 “similar redress under *the theory that* Cobalt . . . discouraged its employees from recording all
5 hours worked.” (Dkt. No. 31 at 5) (emphasis added). Ultimately, the letter urges its recipients not
6 to opt into this collective action, writing, “we strongly recommend that you not sign anything
7 until you have all the facts,” after suggesting that contacting James or his law firm is the proper
8 channel to “receive further information.” (Dkt. No. 50 at 8.)

9 Due to the interfering nature of James’s letter, Cobalt moves the Court to issue a
10 Temporary Restraining Order prohibiting James or his law firm from engaging in similar
11 communication, to set a hearing on a motion for a preliminary injunction to the same effect, or in
12 the alternative to institute a protective order barring further contact until Court-approved notice
13 has taken place. (Dkt. No. 49.)

14 Engelland has filed a notice pursuant to Local Civ. R. 65(b)(5) that he intends to oppose
15 the motion for a TRO. (Dkt. No. 52.) Local Civ. R. 65(b)(5) provides that “If the movant meets
16 the requirements of Fed. R. Civ. P. 65(b), the court may grant the motion without awaiting a
17 response.” As outlined in further detail below, the Court finds the requirements of Fed. R. Civ. P.
18 65(b) satisfied here, and the Court grants a TRO without delay.

19 **II. DISCUSSION**

20 **A. Standard of Review**

21 Under Fed. R. Civ. P. 65, a party seeking a TRO must show (1) a likelihood of success on
22 the merits, (2) a likelihood of suffering irreparable harm in the absence of preliminary relief, (3)
23 that the balance of hardship tips in his favor, and (4) that an injunction is in the public interest.
24 *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (articulating the standard
25 for a preliminary injunction); *see also L.A. Unified Sch. Dist. v. U.S. Dist. Ct.*, 650 F.2d 1004,
26 1008 (9th Cir. 1981). Like a preliminary injunction, issuance of a TRO is “an extraordinary

1 remedy never awarded as of right.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)
 2 (citing *Winter*, 55 U.S. at 24); *see also Frontline Medical Associates, Inc. v. Coventry*
 3 *Healthcare Workers Compensation, Inc.*, 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009) (same
 4 test applied to TROs as to preliminary injunctions).

5 Cobalt seeks a TRO prohibiting Engelland, James, and the law firm of Sebris Busto
 6 James from further communicating with the putative class until September 12, 2016, one week
 7 after Court-approved notice materials are sent. (Dkt. No. 49 at 2.) Cobalt also asks the Court to
 8 set a hearing date on a motion for a preliminary injunction to the same effect. (*Id.*)

9 **1. Likelihood of Success on the Merits**

10 A showing of likelihood of success on the merits to a certain degree is not required;
 11 rather, this factor is considered along with the overall analysis of a balance of hardship. *William*
 12 *Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 525 F.2d 86, 88 (9th Cir.1975).
 13 Where the potential harm to Plaintiff is “sufficiently serious,” it is “only necessary that there be a
 14 fair chance of success on the merits.” *Id.*

15 The Court is endowed with “both the duty and the broad authority to . . . enter appropriate
 16 orders governing the conduct of [class] counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S.
 17 89, 100 (1981). Where, as here, a collective action has been approved, “the Court has an interest
 18 that no . . . communication undermine or contradict the Court’s own notice.” *Parks v. Eastwood*
 19 *Ins. Services, Inc.*, 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002). While the Central District of
 20 California’s decision in *Parks* is merely persuasive, the Court adopts its reasoning: that a 29
 21 U.S.C. § 216 FLSA collective action is analogous to a Rule 23 class pre-certification in that
 22 potential class members are not technically “represented” at this stage of the proceeding due to
 23 the opt-in nature of the collective action. *Id.* Accordingly, while the Rules of Professional
 24 Conduct do not bar communications with putative class members by an opposing party, a court
 25 may choose to restrict such pre-certification communications if presented with “a clear record
 26 and specific findings that reflect . . . the need for a limitation and the potential interference with

1 the rights of the parties.” *Id.* at 1084 (quoting *Gulf Oil*, 452 U.S. at 101). For the purposes of this
 2 inquiry, the Court determines that restriction on communications between opposing counsel and
 3 putative class members should be based on whether the communication at issue is “misleading or
 4 improper.” *Id.* (citing *Impervious Paint Industries v. Ashland Oil*, 508 F. Supp. 720, 723 (W. D.
 5 Ky. 1981); *Pollar v. Judson Steel Corp.*, 1984 WL 161273 (N.D. Cal. Feb. 3, 1984)).

6 While the Court in *Parks* did not find a basis to restrict communications from the
 7 defendant to putative FLSA collective action members, in this instance the Court finds the letter
 8 from James sufficiently misleading and, importantly, capable of undermining the Court’s notice
 9 process. There is a clear record—contained in the letter itself—of James’s and Engelland’s
 10 willingness to mischaracterize the facts and interfere with the notice process approved in this
 11 case. Accordingly, the Court is satisfied that Cobalt has demonstrated a high likelihood of
 12 success on the merits with respect to the issue of whether communication from James,
 13 Engelland, or James’s law firm will interfere with the rights of the parties. This factor weighs in
 14 favor of granting a TRO.

15 **2. Likelihood of Irreparable Harm**

16 As Cobalt’s motion attests, neither the Court nor the parties can “go back in time and
 17 prevent those misrepresentations from occurring.” (Dkt. No. 49 at 10.) In other words, to a large
 18 extent, irreparable harm has already occurred. The Court notes that James’s letter solicits
 19 additional unilateral contact between his law firm and the putative class members. (Dkt. No. 50
 20 at 8) (implying that contacting his firm is the way to “have all the facts.”) This is particularly
 21 concerning and demonstrates that additional harm may occur in the absence of a restriction on
 22 communication. The Court concludes that this factor weighs in favor of granting a TRO.

23 **3. Balance of Hardship and the Public Interest**

24 Next, the Court assesses whether the balance of equities tips in Cobalt’s favor and the
 25 injunction is in the public interest. *Winter*, 555 U.S. at 20. These factors may be considered
 26 together. *A.H.R. v. Wash. State Health Care Auth.*, 2016 WL 98513, at *17 (W.D. Wash. Jan. 7,

1 2016). The “balance of hardship tips sharply in . . . favor” of Cobalt here. *Pile Drivers, Divers,*
2 *Carpenters, Bridge, Wharf & Dock Builders Local Union 34 v. N. California Carpenters Reg'l*
3 *Council*, 992 F. Supp. 1138, 1147 (N.D. Cal. 1997) *aff'd sub nom. Local 34 Pile Drivers, Divers,*
4 *Carpenters, Bridge, Wharf & Dock Builders v. N. California Carpenters Reg'l Council*, 139 F.3d
5 905 (9th Cir. 1998). Simply put, James sent a letter to advance the interests of the *Bell-Beals*
6 lawsuit and in so doing imposed significant hardship on the fair administration of this case. The
7 hardship imposed on James by restricting similar communication is outweighed by the confusion
8 and difficult caused by his communications.

9 Finally, Cobalt does not point to a strong public interest argument in favor of granting a
10 TRO, and the Court does not find evidence of one particularly considering the fact that the
11 putative class members contacted are not technically represented by counsel until they opt-in.
12 However, the Court notes that James’s tactics demonstrate poor judgment and, at best, a
13 willingness to stretch the truth of the Court’s orders.

14 In conclusion, the Court finds that the requirements of Fed. R. Civ. P. 65(b) are satisfied
15 such that the issuance of a temporary restraining order is appropriate. Accordingly, Engelland
16 and his counsel are hereby prohibited from further contact with the putative class that discusses
17 the *Grewe* settlement until September 12, 2016. Engelland and his counsel are not otherwise
18 restricted in their communication with putative collective action members.

19 Additionally, Engelland is hereby ORDERED to show cause as to why a preliminary
20 injunction should not issue, and the Court notes Cobalt’s ongoing motion for a preliminary
21 injunction for Friday, August 26, 2016. Engelland is to file a response brief on or before August
22, 2016. Cobalt and Plaintiffs may file an optional reply in support of a preliminary injunction
23 on or before August 26, 2016. The Clerk is directed to redesignate the present motion (Dkt. No.
24 49) as a motion for a preliminary injunction with a noting date of August 26, 2016.

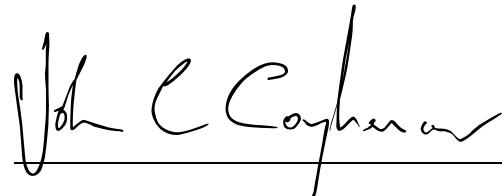
25 **III. CONCLUSION**

26 For the foregoing reasons, Defendant Cobalt’s motion for a temporary restraining order

1 (Dkt. No. 49) is GRANTED.

2 DATED this 10th day of August 2016.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE